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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1233

JANE MITCHELL,
Petitioner,

vs

MID-CONTINENT SPRING COMPANY OF KENTUCKY
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

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MID-CONTINENT SPRING COMPANY OF KENTUCKY
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Mid-Continent Spring Company of Kentucky, respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

STATUTES INVOLVED

The relevant statute involved not heretofore cited is §706(j) of Title VII of the Civil Rights Act of 1964, as amended, §2000e-2(j) which provides:

> "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of . . . sex, . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any . . . sex, . . . employed by any

employer, . . . in comparison with the total number or percentage of persons of such . . . sex, . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

QUESTIONS PRESENTED

1. Whether or not members of the class represented by Plaintiff were entitled to recover backpay pursuant to Title VII and, if so, was backpay properly assessed by the trial court in the sum of $222,885.00?

2. Whether or not sexual quotas are an appropriate subject of injunctive relief where all job classifications were open to female employees for two and one half years before injunction issued and the court determined the "residual effects" of prior discrimination had diminished to such an extent that no class member was entitled to backpay after December 31, 1974?

3. Whether or not the district court was justified in the imposition of a quota system designating a particular job classification for one of every three newly hired male and female employees regardless of the needs of the employer or the wishes of the employee?

4. Whether or not the sum of $75,000.00 is a reasonable attorneys fee for counsel for plaintiff and the class where the total trial time on all issues was less than three days, only one lawyer performed any substantive duties, and where counsel urged the trial court to substantial error in the calculation of the class wide back pay award?

STATEMENT OF THE CASE

The Petitioner has failed to make reference to the facts applicable to at least two critical issues presented herein. First, there has been a lack of background evidence concerning the failure of virtually every class member to bid upon previously all male jobs notwithstanding the existence of a nondiscriminatory job bidding procedure since May 30, 1974. This failure to bid upon an allegedly desireable job conflicted with the claims of class members that they would have accepted these jobs but for Respondent's discrimination based upon sexual sterotypes. As a consequence of this failure to bid the Special Master cut off any accrual of backpay after 1975 stating:

> "Although the Special Master has determined that the back pay award for 1974 should stand, it has further been determined that back pay for 1975 should not be awarded. The evidence presented at the hearing before the Special Master indicates that the defendant made several more bonafide offers for job transfers to female employees during 1975 and 1976, and that female employees began to bid on these jobs during 1975. Currently, two female employees are working in what were formerly male jobs. The Special Master has determined that the 'residual effects' of the company's prior practices and policies diminished greatly in 1975 as female employees began to realize that formerly male jobs were, in fact, open to them. The decision of this Court in November of 1974, in favor of the plaintiff, may have had some effect, even though an injunction was not imposed by the Court." (App. A p. A-1)

The District Court accepted this determination in its Memorandum Opinion and Order of July 7, 1976 (App. B, p. A-7). Therefore, backpay to the class was limited to the years 1967-1974 inclusive. The disinterest of the class in higher paying jobs called into question the appropriateness of the award of backpay on an "averaging" theory from the onset of litigation.

The second misstatement is the assertion that Petitioner, Jane Mitchell, "questioned" Respondent's alleged "sexual caste policies and practices". The record is devoid of evidence to that effect and the District Court made specific findings that Petitioner's conduct was confined to filing anonymous charges against Respondent and that at most Respondent could only "suspect that she was cooperating with either the Department of Labor or the EEOC (Pet. App. A. pp. 23a-24a). In fact, Mitchell's co-called protected conduct was totally unknown to Respondent who discharged her for lawful, nondiscriminatory reasons.

REASONS FOR DENYING THE WRIT

I. Absent Proof of Loss of Earnings Class Members are Not Entitled to Backpay.

The class members in this action were never refused admission to higher paying jobs. Indeed, the record is devoid of evidence that any class member sought promotion to the more skilled or more difficult jobs performed by male employees. The District Court made its backpay findings at a time when it did not have the advantage of this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843 (1977) and the District Court assumed that a presumption for backpay arose in favor of the class members (Pet. App. B. para. 18, p. 30a). However, in *Teamsters* this Court noted that a mere differential between wages did not "warrant a conclusion" that all employees would prefer a higher paying job because there also existed a differential in working conditions, stating:

> "The known prospect of discriminatory rejection shows only that employees who wanted [higher paying] jobs may have been deterred from applying for them. It does not show which of the nonapplicants actually wanted such jobs, or which possessed the requisite qualifications." 97 S. Ct. at 1871.

Accordingly this Court held that while nonapplicants are not "inexorably" barred from backpay they have the "difficult task of proving that they should be treated as applicants and therefore are presumptively entitled to relief. . ." (97 S. Ct. 1869). Therefore the District Court engaged in an unwarranted presumption and wrongly placed upon Respondent the burden of "establishing by clear and convincing evidence that the particular class member would not have earned the wages even if Mid-Continent had not limited and segregated female employees . . ." (App. "C", p. A-11).

Because of this clear error by the District Court, and because there was abundant evidence that virtually every class member did not wish to leave a relatively easy job for one more physically and mentally demanding the Court of Appeals remanded this case for a determination as to which female employees were "actual victims" of the discrimination (Pet. App. A, pp. 18a-19a).

The undisputed evidence that class members were willing to take backpay, but not the more difficult work is both abundant and compelling. On May 30, 1974, Respondent revised its policies with respect to shift and departmental transfers and promotions (R.526-527 and Plf. Exh. 23, A. 364; 923-925). In essence the new procedures provided all employees could bid on vacancies appearing on either shift if they wished to transfer within their same department and the position would be awarded to the most senior employee, business conditions permitting. Employees wishing to change departments or seek promotion were also given the right to bid on available positions so long as the bid was for a higher rated job. In such circumstances, the senior bidder was absolutely entitled to the job. Employees who wished to make a lateral transfer could request a change but they had no bidding rights as such. Employees who bid on higher rated jobs were provided a ninety (90) day probationary period in which to qualify or, failing that, they were free to return to their former position without loss of pay, benefits or seniority. None of the new procedures called for employees to relinquish any presently vested benefit or seniority (Plf. Exh. 23, R. 364, 923-925).

Following this new procedure, but before trial, several "set up" jobs were posted for bid but not one member of the class bid on those jobs (R. 482). On July 18, 1974, three more "set up" jobs were posted for bid but no one in the class bid on the job and as a consequence the Superintendent asked each female employee to sign to show whether or not they wanted to bid (R. 488-494 and Def. Exh. B(3), R. 494, 934).[1] Thereafter on July 31, 1974, another "set up job" was posted but it also went unbid (R. 485-486). The last position posted before trial was on September 5, 1974, when a coiling department "set up" job was vacant and no employee bid on the job (R. 480-483).

These postings for bid were a topic of conversation among the female employees but they nevertheless did not want the jobs (R. 279-280). The only employee at the trial to state why she did not "bid", Icie Lawrence claimed she "didn't feel like" she would be trained, but acknowledged that this was merely a "supposition" on her part (R. 305-306). No other members of the Plaintiff class testified with respect to the proffered "set up" jobs.

After a trial on liability, but before a determination of backpay, some "set up" jobs were available but the number was sharply reduced because of the 1975-1976 recession and its effect upon the automobile industry (R. 577-578, 588). The additional "set up" jobs which did appear in various departments prior to final judgment are as follows:

1. Coiling, Sept. 10, 1975 (R. 578)587).
2. Four-Slide, Dec. 17, 1975 (R. 587-594).
3. Hopper Looper, Dec. 17, 1975 (R. 587-594).
4. Coiling, Jan. 5, 1976 (R. 594-598).
5. Grinding, Jan. 5, 1976 (R. 594-598).
6. Coiling, Feb. 9, 1976 (R. 598-600).

[1] A copy of the posting was sent to each employee on layoff (R. 499).

7. Kick Press, Mar. 15, 1976 (R. 600-605).
8. Coiling, Apr. 19, 1976 (R. 605).

Of the eight post-trial job postings, only one female employee, Linda Brinlee, made a serious bid (R. 600-605 and Def. Exh. B(10), R. 935-936). Brinlee, the senior bidder, was awarded the job (R. 601).

Females were hired to work "set up" jobs post-trial but they were new hires of outside job applicants rather than incumbent employees, to wit: Martha Wade (R. 584-585); and Linda Rigsby (R. 596-597). Several class members expressed an interest in the jobs but declined because of the possibility of night shift work assignments: Cooley (R. 580-581); Phipps (R. 588-589); and Sigars and Casada (R. 591-592).

Some employees stated their reasons for failing to bid at the hearing conducted by Special Master Dan E. Kemp on April 22, 1976. However, without exception these employees advanced unpersuasive, subjective reasons for their refusal to bid.[2]

[2] Elizabeth Carter relied upon unsupported fears of bad treatment and training (R. 634-638, 647, 652). Helen Blane asserted a fear of unfair treatment by rank and file male employees (R. 656-658, 661). Linda Brinlee stated she was afraid of discharge if unsuccessful notwithstanding Respondent's assurances to the contrary (R. 667, 679-680, Plf. Exh. 23, R. 364, 923-925). Later Brinlee stated she would not work second shift, and she feared adverse comments from male coworkers (R. 668-669, 681-682). Geneva Morris considered one of the thirteen jobs, but refused to bid because the *only* benefit to be gained was a wage increase (R. 686-688). Lilly Grady did not bid at first because the job only paid $.40 more per hour than hers (R. 219, 701-702, 707-708). Grady eventually bid on a job, was awarded the job and turned it down [Def. Exh. B(10), R. 935-936], Minnie Futrell was offered a job but turned it down because of obligations to her grandson, and when Icie Lawrence and Geneva Morris were then offered the job they declined because of their "health" [Def. Exh. B(10), R. 935-936].

Notwithstanding the failure of all but one class member[3] to accept work in a higher paying job classification, the District Court awarded the class backpay in the total amount of $222,885.00 (Pet. App. C, pp. 33a-35a). The District Court decided upon this sum after the Special Master had recommended a system of averaging claiming the use of a ". . . formula of comparability and a classwide approach. . ." was required because he deemed it impossible to reconstruct events as if there had been no discrimination (App. D, infra, p. A-15).[4] This finding flies in the fact of *Teamsters* where this Court held:

> "A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices. . ." 97 S. Ct. 1871.

Even before the decision in *Teamsters* it was clear that the District Court's judgment defied the "properly owing" and "rightful place" theories of backpay which many appellate courts applied in civil rights cases. *Jinks v. Mays*, 464 F. 2d 1223, 1226 (5th Cir. 1972); *Johnson v. Goodyear Tire & Rubber Company*, 491 F. 2d 1364 (5th Cir. 1972; *Thornton v. East Texas Motor Freight*, 497 F. 2d 416 (6th Cir. 1974); *Meadows v. Ford Motor Company*, 510 F. 2d 939 (6th Cir. 1975; *EEOC v. Detroit Edison Company*, 515 F. 2d 301 (6th Cir. 1975), vacated 431 U.S. 951 (1977); *Bowe v. Colgate Palmolive Company*, 489 F. 2d 896, 902 (7th Cir. 1973); and *Evans v. Sheraton-Park Hotel*, 503 F. 2d 177 (D.C. Cir. 1974). And which this Court approved in *Teamsters v. U.S., supra.*

[3] Brinlee (R. 600-605).

[4] The net effect of this system was to assume that 1 of every 4 "set up" jobs would have been filled by a female over a 10 year period (App. D, p. A-34).

More particularly, Courts have not been disposed to award backpay to claimants who refused the work they claim they were allegedly denied. In *Nance v. Union Carbide Corporation*, 540 F. 2d 718, (4th Cir. 1976) the Court denied plaintiff's claim she was discriminatorily denied a job, among other reasons, because she refused a number of "heavy" jobs when the same were offered *after* discriminatory rules were revoked (See fn. 19); in *U.S. v. Hayes International Corporation*, 456 F. 2d 112 (5th Cir. 1972) the Court held that minority members who had been discriminately held in low wage jobs were entitled to only "one bona fide opportunity to transfer" when better jobs became available. In *Peltier v. City of Fargo*, 533 F. 2d 374 (8th Cir. 1976) female "car markers" were not deemed entitled to the position of patrolmen when they had not applied for the position and had declined to take an examination for the positions when offered the opportunity; in *Rios v. Steamfitters, Local 638*, 400 F. Supp. 993 (S.D. N.Y. 1975) the Court allowed backpay only to those members who had made written application for the more lucrative work; and finally in *UTU v. Norfolk & Western Ry.*, 532 F. 2d 336 (4th Cir. 1975) it was expressly held that one of the factors a Court should take into account during the defense of a classwide backpay claim was the ". . . free and voluntary decision to forego higher paying work opportunies . . ." by an individual class member. *Id* at 341. Indeed, even before *Teamsters* this Court held that a finding of discrimination against a class does not automatically insure an award of backpay as the "make whole" purpose was modeled after the National Labor Relations Act. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Clearly it is difficult to "make whole" class members claiming lost pay for a job they never wanted and would never accept on a voluntary basis. An employer is judged by the "consequences" of his actions rather than his "motivation".[5] To judge these employees by that same standard it would clearly appear that backpay should not have been awarded until proof of actual loss was established, if indeed it could be proven under these circumstances. Therefore

[5] *Griggs v. Duke Power Co.*, 401 U.S. 424 at 432 (1971).

the Court of Appeals did not err, it merely remanded the matter to District Court so that Petitioner's class could attempt to carry its burden of proof, all in accord with *Teamsters v. U.S.*, 431 U.S. at 371.

II. Affirmative Action Plans and Injunctive Relief Were Properly Denied as Unwarranted.

The Respondent herein has never deliberately engaged in any unlawful activity. The facts and circumstances of this case reflect that injunctive relief is both unnecessary and unwarranted.

Respondent floundered about leaderless for several critical years before and after this litigation began, precluding effective resolution of the issues at an earlier time because its President, Lou Langhi, suffered partial paralysis and a severe speech impediment as a result of brain surgery in 1971 (R. 524-525). Langhi's wife then was forced to assume control of Respondent (R. 525-526). At this juncture there were no allegations of classwide discrimination, and none were made until the Second Amended Complaint was filed on July 26, 1973 (R. 2-3, 12-17). No claim whatever was made regarding the exclusion of male employees from certain jobs or seeking any injunctive or other relief with regard to male employees (Second Amended Complaint, R. 12-17). On February 26, 1974, the District Court certified the action as a class action (R. 21) and on May 30, 1974, Respondent established its nondiscriminatory bidding procedure (Plf. Exh. 23, R. 364, 923-925). Since that time the undisputed evidence has shown that female employees have enjoyed the undisturbed right to transfer to formerly all male job classifications as found by the Special Master, the District and by the Court of Appeals who determined that the injunctive relief and quota sought by Petitioner were not justified by the record (Pet. App. A., p. 20a). Indeed, the District Court did not deem injunctions or quotas necessary when it rendered judgment on November 26, 1974 (Pet. App. B, p. 22a). Thereafter Petitioner sought an injunction on July 31, 1975, which the

Court denied pending the decision of the Special Master (A. 7, 90). The Special Master then made his well known finding that valid offers of promotion and transfer were made and the "residual effects" of prior practices had "diminished greatly" (Pet. App. A, p. 20a). While it is not a matter of record, having taken place post trial, it should also be noted that Respondent's employees have organized under the auspices of the United Auto Workers and a collective bargaining agreement has covered their terms and conditions of employment since August 29, 1977.

Respondent is cognizant of the fact that the legitimacy of "quota" systems pursuant to Title VII is an open question. Nevertheless, Title VII only authorized injunctive relief for those allegedly discriminated against. Indeed, Title VII, Section 706(j) 42 U.S.C. §2000e-2(j) specifically prohibits reliance upon the quota system. The many years in which all job classifications have been open to class members completely justifies the refusal to order injunctive or affirmative relief. *Manning v. UAW*, 466 F. 2d 812 (6th Cir. 1972); *Koeber v. Westinghouse Electric Corporation*, 480 F. 2d 240 (3rd Cir. 1973); *Barnett v. W.T. Grant Company*, 518 F. 2d 543, 550 (4th Cir. 1975); *Peltier v. City of Fargo*, 533 F. 2d 374 (8th Cir. 1976); *Nance v. Union Carbide Corporation*, 540 F. 2d 718 (4th Cir. 1976); and *Sledge v. J. P. Stevens & Co.*, 585 F. 2d 625 (4th Cir. 1978). Indeed, in *Sledge* the Fourth Circuit emphasized the use of a "cautious approach to the imposition of curative quotas" even by Courts which have imposed such quotas, and it declined to establish quotas for hiring and promotion because of the absence of "compelling circumstances." Petitioner is hard pressed to show the compelling urgency which would justify an injunction. Indeed, to impose an injunction where a valid, extant collective bargaining agreement exists seems to ignore reality and the true wishes of the concerned employees.

The particular injunctive order sought by Petitioner would create specific problems which would unnecessarily jeopardize the efficient operation of Respondent. The District Court's quota system was a particular problem because it requires per-

sons of a given sex to be assigned a particular class of jobs without regard to their personal preferences, abilities, skills and desires (Pet. App. C, pp. 34a-35a). Thus, a male job applicant may well refuse to work in the secondary or grinding departments, and a prospective female employee may refuse to work around a machine which is hot, noisy, oily and which demands so much of her physical energy and strength that she is unable to respond to the needs of her family.

Petitioner assumes such concerns are irrelevant, the problem of the applicant, and do not form the proper basis for judgment. However, Courts are understandably cautious when its orders may be an unwarranted intrusion into the affairs of others. Should Respondent advertise, interview an employee who subsequently refuses a job when it is offered because it is not what he or she wants merely to satisfy an arbitrary order? While this waste of resources would be bad enough, the waste in terms of newly hired employees whose time on the job and training is wasted when they quit or are fired for poor performance is even greater. The Court of Appeals recognized that most know what is best for themselves and that personal judgment is due judicial deference.

All Petitioner had done to justify a quota from the District Court was to simply request an injunction requiring the hiring of one female to every two males in some jobs and one male to every two females in other jobs. No expert witness was called to testify, no statistical evidence was offered; all the Court had to proceed upon was the prayer of Mitchell's attorneys. This background epitomizes the arbitrary nature of the District Court's decision and once again reveals a sudden "about face" in the Court's previous position.

Finally, no quota system has ever been approved which is applied in reverse fashion, that is forcing a so-called preferred class into jobs previously held by those alleged to be the victims of previous discrimination. It would be egregiously unfair to permit such a quota now where the issue was never alleged, litigated or considered and only the most abstract concepts can be uttered in support of Petitioner's theory. Even the District

Court recognized the potential harm of its injunction when it stayed that part of its own order (R. 129). Therefore, affirmative injunctive relief was never justified at trial and is even less justifiable now.

III. The Court of Appeals Properly Required the District Court to Correlate the Results Obtained to the Attorney's Fee Award.

Petitioner's counsel claimed a total of over 750 hours of work on this case and the District Court awarded them a fee of approximately $100.00 per hour (Pet. App. C, p. 35a). One attorney, Owens, claimed to have worked 340 hours on the case without once appearing in Court, making a motion or filing a brief (R. 113-118). The lead counsel, Hickey, certainly did devote substantial time to the case but a great deal of that time was dedicated to urging the Court to err with respect to the backpay awards. Certainly a Court is entitled to "weed out" those hours spent at unproductive or unsuccessful endeavors. *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974); and *Morton v. Charles County Board of Education*, 373 F. Supp. 394 (D.C. M.D. 1974) affirmed 520 F. 2d 871 (4th Cir. 1975), cert. denied 423 U.S. 893 (1975). Hours *claimed* on a case cannot be the "sole basis for determining a fee", especially where there may be some doubt as to the efficacy of the time attorneys *claimed* to have worked. See *e.g., Weeks v. Southern Bell Telephone & Telegraph Co.*, 467 F. 2d 95, rehearing and rehearing en banc denied 471 F. 2d 650 (5th Cir. 1972).

Johnson v. Georgia Highway Express, supra, should not be read to encourage aggressive counsel to use a hapless employer as a "whipping boy" to be flogged at will with the certain assurance that attorney's fees will reward the unsuccessful the same as the successful. The words of the Court in *Johnson, supra,* are *appropos* here:

> "To put these guidelines into perspective and as a caveat to their application courts must remember they do not have a mandate under Section 706(k) to make prevailing counsel

rich. Concomitantly, the Section should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general. The statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel. . ." 488 F. 2d at 719.

The Court of Appeals here merely remanded the matter to the trial court who was free to apply the twelve standards articulated in *Johnson* with clear notice that $75,000.00 was an excessive attorneys fee should the class recovery be small.

CONCLUSION

For the reasons before stated, the Writ should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

ENTERED MAY 13, 1976

SECOND ADVISORY REPORT OF THE SPECIAL MASTER

Pursuant to the guidelines for Special Master entered January 20, 1975, and the orders of this Court dated March 1, 1976, and March 23, 1976, the Special Master submits to the Court and to the parties his Second Advisory Report containing an explanation of certain adjustments made in the tentative amounts of back pay recommended for members of the class, an explanation of his recommendation concerning back pay for 1974 and 1975, and a recommended amount of back pay to be awarded to certain members of the class, as well as a recommended amount of back pay for the plaintiff, Jane Mitchell. This report should be read in conjunction with the Special Master's Preliminary Report as all Exhibits to the Preliminary Report are made use of herein.

I

DEFENDANT'S OBJECTION CONCERNING CERTAIN FEMALE EMPLOYEES WHO WERE LAID OFF AND ON SICK LEAVE BETWEEN 1967 AND 1974.

On June 11, 1975, defendant filed Objections To The Preliminary Advisory Report Of The Special Master and defendant's Objection Number 6 was that "The Special Master has erroneously assumed that the names of males and females set forth in Exhibits 1 through 8 (Special Master's Preliminary Report) was in the entire year, and this error has created a greater error in his computations in the differential earned between male and female wages." In support of it's objection,

defendant submitted the Affidavit of Myra Langhi, which Affidavit contained the names of certain female employees who the Special Master had thought to have worked the entire year based on information furnished to the Special Master, but who, in fact, had not worked the entire year because of being laid off or on sick leave. The defendant amplified on this proof during the hearing held before the Special Master on April 22, 1976.

Although defendant was somewhat tardy in coming forth with evidence of lay offs and sick leave (this information was not originally furnished the Special Master) and although defendant apparently represented in it's Answers to Plaintiff's Interrogatories of October, 1973, that "No record of lay offs have been made or maintained" (see pages 59 through 61, Transcript of hearing before the Special Master), the Special Master has determined that his original computation regarding average male and female wages for the years 1967 through 1974 was based upon an erroneous assumption that certain female and male employees had worked the entire year when, in fact, they had not. This error resulted in a substantial distortion and, therefore, adjustments have been made by striking from Special Master's original Exhibits 1 through 8 (computations of average male and female wages of 1967-1974) the amounts earned by all male and female employees who did not work the entire year because of lay offs and sick leave. This resulted in a higher average annual wage for both male and female employees for all years concerned, and resulted in the average wage differential between male and female employees being less than originally stated in the Special Masters Preliminary Report. (See Special Master's Exhibits 22 through 29 for a listing of those individuals whose wages were deleted, and revised average male and female annual wages.) The end result of this adjustment is to reduce the total recommended class back pay award by $21,351.00.

In the Memorandum Opinion And Order dated March 1, 1976, the Court stated on Page 6 that the Special Master's inquiry should be directed only to the year 1974 and that back pay awards for any female employees for the years 1965 through 1973 are not to be placed in jeopardy by the Special Master's

decision regarding rights to back pay in 1974. However, the Special Master views the above adjustment as technical in nature and a point not reached by the Court in the Memorandum Opinion And Order of March 1, 1976. At that time, the Court was addressing itself to defendant's Motion To Reconsider The Guidelines For the Special Master, as well as plaintiff's Motion for a Preliinary Injunction and an Award of Attorney Fees. Defendant's original objections to the Preliminary Report of the Special Master have not been addressed by the Court at this point in the case, although many of the points raised in defendant's original objections were included in defendant's Motion To Reconsider The Guidelines.

II

DEFENDANT'S OBJECTIONS TO BACK PAY IN 1974 AND 1975

Defendant has objected to the awarding of any back pay subsequent to May 30, 1974, because on that date, defendant instituted a new procedure whereby all employees could bid upon any job opening in the plant. Furthermore, defendant has contended that the refusal of almost every female employee to bid on certain jobs which were posted for bidding during 1974, 1975 and 1976, should preclude these female employees from receiving any back pay subsequent to those refusal dates. The Court, in it's Memorandum Opinions of March 1, 1976, set out detailed guidelines regarding this issue and evidence was presented at a hearing before the Special Master on April 22, 1976. In addition to testimony from plant officials concerning the refusal of female employees to bid on jobs offered, several members of the class testified regarding their reasons for refusing to bid on said jobs. A verbatim transcript of said hearing has been filed herein.

In accordance with the Court's guidelines of March 1, 1976, and after considering the evidence submitted by the parties, the Special Master has determined that the defendant made several

bonafide offers of employment to female employees beginning in July, 1974, and continuing until the current date. However, the prior practices and policies of the defendant had such a residual effect that the female employees of the defendant company thought or believed that they might be harassed or possibly fired by defendant if they bid on any of the jobs mentioned in 1974. All of the members of the class who testified at the hearing before the Special Master stated among their reasons for not bidding on jobs posted that they did not believe they would receive fair treatment, and they did not beliee that they would be trained properly by the defendant, thereby resulting in their possible failure to handle the new jobs. The members of the class testified that they were not fully aware of the type of jobs they were being invited to bid on, and they were fearful that they would be laughed at and harassed by male employees at the plant.

Although the Special Master has determined that the back pay award for 1974 should stand, it has further been determined that back pay for 1975 should not be awarded. The evidence presented at the hearing before the Special Master indicates that the defendant made several more bonafide offers for job transfers to female employees during 1975 and 1976, and that female employees began to bid on thesc jobs during 1975. Currently, two female employees are working in what were formerly male jobs. The Special Master has determined that the "residual effects" of the company's prior practices and policies diminished greatly in 1975 as female employees began to realize that formerly male jobs were, in fact, open to them. The decision of this Court in November of 1974, in favor of the plaintiff, may have had some effect, even though an injunction was not imposed by the Court.

III

AWARD TO JANE MITCHELL

At the hearing before the Special Master on April 22, 1976, defendant was provided with an opportunity to examine the plaintiff, Jane Mitchell, regarding interim earnings, or amounts earnable with reasonable diligence, since the time of her discharge from the defendant company in August of 1969. Also at this hearing, Mrs. Mitchell presented proof of unemployment compensation payments which she received in 1969, 1970 and 1973. The Special Master has determined that the plaintiff, Jane Mitchell, has exercised reasonable diligence in attempting to secure interim employment from 1969 through 1975, and Exhibit 32 contains a computation of the total back pay due the plaintiff, Jane Mitchell, from 1969 through 1974. Adjustments have been made to Mrs. Mitchell's back pay award as follows:

1. Some of the seven contemporary employees of Jane Mitchell whose earnings were used to determine an average annual wage of employees with substantially the same date of hire as Jane Mitchell were discovered to have been laid off or on sick leave during some of the years concerned. Where applicable, the wages of these employees were deleted in determining an average, thereby resulting in a somewhat higher average annual wage for the sample employees used to determine Mrs. Mitchell's back pay award.

2. Unemployment compensation payments were deducted from Mrs. Mitchell's award.

3. Interest through 1975 was added to Mrs. Mitchell's award.

Mrs. Mitchell's back pay award has been computed only through 1974. Since Mrs. Michell has not been rehired by the defendant, back pay for 1975 and to the current date will apparently be due at such time as this litigation is completed.

Conclusion

After making the adjustments referred to in Part I above, a revised amount of back pay for each of the ten years concerned has been determined. This amount of back pay includes interest at six percent (6%) per annum through 1975. (See Exhibit 30 for a breakdown of this computation by year.) The total amount of back pay and interest for the class after these revisions is $222,885.00. Exhibit 31 reflects certain changes which should be made in Special Master's original Exhibits 10 through 19 regarding the total amount of back pay for each year that is to be divided equally between women who worked more than one-half of each of the years concerned. The list of each female employee entitled to share in each of the ten yearly awards has not been reproduced as the names of employees have not been revised, only the amounts of money. As stated in the Special Master's Preliminary Report, it is recommended that 238 members of the class share in the awards, and that 92 members of the class be excluded because of insufficient work time. Exhibit 21 contains a list of all class members for whom back pay is recommended and the amount due each.

In accordance with guidelines 7 and 8 of the original Guidelines for the Special Master, a notice to the members of the class shall be prepared by counsel for the plaintiff, subject to objections by the defendant, within a reasonable time after receipt of this report. Said notice shall be mailed to the members of the class by the defendant and it will then be determined whether it will be necessary to hold further hearings in this matter.

This 4th day of May, 1976.

J. D. KEMP, SPECIAL MASTER

Certificate of Service Omitted

APPENDIX B

Caption Omitted

Entered July 7, 1976

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the plaintiffs and defendant's exceptions to the Second Advisory Report submitted by the Special Master. We believe that we should rule on these exceptions prior to our authorization of the "notice to class" since if we accept any of the exceptions which pertain to the class and its award the information being disseminated would be incorrect and, thus, the issuance of a new notice to class would be required.

We accept the technical change which the Special Master has made concerning the amount of back pay which should be awarded for the years 1967 through 1974. Notwithstanding the Special Master's decision to strike those wages of male and female employees who did not work the entire year because of lay-offs and sick leaves, a decision which was made in order to formulate a more accurate annual wage for each group of employees and thereby calculate more precisely the proper average wage differential for each year, the defendant argues the Special Master did not go far enough in amending the back pay formula. The defendant would have the Court order the Special Master to reduce the total number of men in the first component of the formula to correspond to the number of men who worked the entire year. We disagree with this contention. The first component actually represents available male jobs not

just men who labored the entire year.[1] The fact there were not enough men during any particular year between 1967 and 1974 to fill all of the available male jobs for the entire year is irrelevant.

The final point which we need to address is whether the Special Master has correctly computed Jane Mitchell's award for lost wages. We believe he has not. The Special Master erred in not terminating Jane Mitchell's lost wages award as of November 26, 1974. The Court believes the plaintiff's lost wages award should only run from August 11, 1969, the day she was fired by the defendant, until November 26, 1974, the day the Court's Findings of Fact and Conclusions of Law were entered. We have reached this determination for two independent reasons.

First, in Conclusion of Law No. 19 we stated, in part:

> Jane Mitchell *will be immediately re-employed by Mid-Continent if she so desires*, and the Master hereinafter appointed will establish the total amount of her wages she would have reasonably earned from August 11, 1969, *to this date*, less actual earnings during that period. . . .

(Emphasis added). This Conclusion of Law which is phrased in mandatory rather than permissive language was all that was necessary for Mrs. Mitchell to regain her job at Mid-Continent *had she so desired.* She apparently did not wish to return to Mid-Continent for there is no evidence that she ever attempted to be reinstated at her former job. Having failed to take advantage of Conclusion of Law No. 19, the Court cannot grant her an award for lost wages beyond November 26, 1974.

---

[1] The first component must represent available male jobs because that component is the multiplicand in the formula which when multiplied by 25/(the multiplier) gives rise to a product which equals the number of male jobs the women employees would have held but for the discriminatory practices of the defendant. We have also been assured by the Special Master that the figures involved will not change even though the first component equals male jobs rather than men who worked the entire year.

It cannot be argued that the defendant was required to offer Mrs. Mitchell her former employment. We specifically stated in Conclusion of Law No. 19 that she was to be immediately re-employed if she so desired; therefore, the burden was on the plaintiff to seek her prior employment if she wished to make a claim for lost wages beyond November 26, 1974. In addition, given our facts it cannot be contended tht the Court should have issued an injunction ordering the defendant to rehire the plaintiff. Such action would have been repetitive and premature. Mrs. Mitchell was already armed with a federal court order which stated tht she was to be immediately rehired if she wanted to be employed at Mid-Continent. Federal courts are purposely slow to use their injunctive powers if another alternative is available. In this case our Conclusion of Law No. 19 was all that was initially necessary for the plaintiff to present to the defendant in order to regain her job. If she had attempted to seek her prior employment at Mid-Continent pursuant to Conclusion of Law No. 19, *and been refused*, then, and only then, would she have been entitled to injunctive relief.

The second independent reason we have concluded to abate the plaintiff's lost wages award as of November 26, 1974, is Mrs. Mitchell's failure to search with reasonable diligence for alternative employment. During her testimony on April 22, 1976, the plaintiff set forth in great detail the places of employment that can be drawn from Mrs. Mitchell's seven-year search for employment is that she apparently was content to seek employment from businesses which had no intention of hiring her. Thus, and notwithstanding the plaintiff's contentions to the contrary, the Court does not believe the facts demonstrate that Mrs. Mitchell was reasonably diligent in seeking alternative employment. For this reason we have also concluded to abate her lost wages award on November 26, 1974.

Having determined that the plaintiff's lost wages award is to commence August 11, 1969 and run until November 26, 1974, the Court also instructs the Special Master to reduce that award by 10 per centum. This reduction is the result of what "the Court considers to have been . . . [Mrs. Mitchell's] truculent

action at the time of her discharge in failure to apprise and give notice to her employer as to what her actual activity was in the solicitation of Mrs. [Louise] McGehee." Conclusion of Law No. 19.

In addition the Special Master is to reduce the plaintiff's lost wages award by the unemployment compensation and any interim wages Mrs. Mitchell received between August 11, 1969, and November 26, 1974. Finally, since we have decided to terminate the plaintiff's lost wages award on November 26, 1974, Mrs. Mitchell's back pay award should also abate after 1974.

Wherefore, for the foregoing reasons, the Special Master's Second Advisory Report is modified to conform with this Memorandum Opinion and Order, and, as modified, is accepted by the Court.

So Ordered. July 2nd, 1976.

JAMES F. GORDON
Senior United States District Judge

APPENDIX C

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

JANE MITCHELL
Plaintiff

v

Mid-Continent Spring Company of Kentucky
Defendant

Civil Action No. 2164-P

GUIDELINES FOR SPECIAL MASTER

1. The class of persons eligible to recover back pay are all female employees of the defendant, Mid-Continent Spring Company of Kentucky, who have been employed at any time from July 2, 1965, to the present time.

2. Equitable monetary relief, i.e., back pay, is owed by the defendant for all economic loss incurred by this class from July 2, 1965, to the present time.

3. Defendant, Mid-Continent Spring Company of Kentucky, shall provide a list showing the names and current of last known addresses, date of hire, and date of termination, if applicable, of all persons in the class described in Guideline 1 above. Copies of this list shall be filed and served on the plaintiff.

4. Defendant, Mid-Continent Spring Company of Kentucky, shall provide a list showing the names, date of hire, and date of termination, if applicable, of all male employees of the company. Further, defendant shall provide all payroll records and profit sharing records from July 2, 1965, to the present time. Copies of these lists and documents shall be filed and served on the plaintiff.

5. The Special Master shall devise a formula for computing the difference in wages earned by members of the class listed in Guideline 1 and male employees with the same or substantially the same date of hire by Mid-Continent. These differences, plus adjustments in profit sharing based on the earnings of the comparable male employee, plus interest at 6% per annum, shall be charted for each member of the class listed in Guideline 1, and shall be reported to the Court and the parties.

6. Within 30 days of this advisory report of the Special Master, the parties may challenge the individual determinations. The party challenging the determination or determinations shall be required to state with particularity the basis of the objection. Thereafter, both parties shall have the right to make prompt discovery of all documents and information relied upon by the other side.

7. All persons on the list provided by Mid-Continent in response to Guideline 3 shall be notified by certified mail, return receipt requested, of the pendency and nature of this action, the tentative amount of back pay computed by the Special Master for them, their opportunity to contest the tentative amount, and any challenge or objection which has been raised by plaintiff or Mid-Continent to the tentative amount. The contents of the notice shall be formulated by counsel for plaintiff and the class, subject to objections by defendant and approval by the Court. Defendant, Mid-Continent, shall bear the cost of the notice as taxable costs of the action.

8. If necessary, the Special Master will schedule proceedings before him where the parties shall present documentary and/or testimonial evidence relevant to the individual determination or

determinations. Such evidence shall be received at a full due process hearing or hearings.

9. The Special Master should keep in mind that the defendant has the burden of establishing by clear and convincing evidence that the particular class member would not have earned the wges, even if Mid-continent had not limited and segregated female employees in the base rate job classification since July 2, 1965. All doubts and uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer. Further, unrealistic exactitude in awards is not required.

10. The Special Master shall be provided with tax returns, W-2 forms, and other documentary evidence in the possession of the parties, so that he may subtract interim earnings from the amount Jane Mitchell would have earned from August 11, 1969, to the present, based on what other female employees with the same or approximately the same date of hire actually earned. The Master shall make his recommendation on the back pay award for Jane Mitchell at the time he makes his recommendations with respect to the class awards.

11. Following all of these proceedings, the Special Master shall make his advisory determinations and recommendations to the Court in writing, and shall include a statement from which the basis for the determination may be ascertained. Copies of this advisory report shall be provided to the parties.

12. The Court will afford the parties opportunity to object to or to comment on the determinations. The Court will consider such objections or comments prior to adopting, modifying or rejecting the determinations and prior to entering any order thereon. The Court will state findings, conclusions, and reasons for its Order acting upon the advisory determinations. In formulating its Order, the Court will not review the substance of the Special Master's determinations, but will limit its inquiry to

whether the determinations were made in accordance with the terms and intent of the Court's opinion and these Guidelines.

James F. Gordon
Chief Judge

Date: _____

APPENDIX D

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Jane Mitchell
Plaintiff

v.

Mid-Continent Spring Company,
Defendant

Civil Action No. 2164-P

PRELIMINARY ADVISORY REPORT OF THE SPECIAL MASTER

(Filed May 19, 1975)

Pursuant to the Order of this Court dated November 19, 1974, and the Guidelines For Special Master entered January 20, 1975, the Special Master herein submits to the Court and to the parties his Preliminary Advisory Report containing a formula for computing back pay for members of the class in this action, a tentative amount of back pay to be awarded to certain members of the class and a tentative award of back pay for the plaintiff, Jane Mitchell. Pursuant to Paragraph 6 of the Guidelines For Special Master, within thirty (30) days of this Advisory Report, the parties may challenge the individual determinations. The party challenging the determination, or determinations, shall be required to state with particularity the basis of the objection. Within a reasonable time after the receipt of

objections from the parties herein, a notice will be formulated and mailed pursuant to Paragraph 7 of the Guidelines For Special Master. At that time, the Special Master will determine if it will be necessary to hold hearings in accordance with Paragraph 8 of the Guidelines For Special Master.

The task of the Special Master was to devise a formula for computing "economic loss" incurred by members of the class, male and female employees of the defendant company from July 2, 1965 to the present time. In determining the economic loss incurred by the members of the class, the Special Master considered the Findings of Fact and Conclusions of Law entered by the Court on November 26, 1974, and particularly the conclusion that members of the class were discriminated against, not only by being denied the opportunity to qualify for and hold jobs other than machine operator, but, also, the conclusion that class members were discriminated against because of separate seniority lists and differences in policy regarding shift transfers. Said another way, a computation of the economic loss includes more than simply determining which male jobs would have been held by females but for the company's discriminatory practices. The discrimination included more than the denial of promotion opportunity.

All case law cited by counsel was consulted by the Special Master and particular reliance was placed on *Meadows v. Ford Motor Company*, F2d (CA6 January 24, 1975); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 21 (CA5 1974); and *Head v. Timken Roller Bearing Co.*, 7FEP 987 (DC SD Ohio, April 8, 1974). The language considered most helpful to the Special Master and commended to the attention of the District Court in the *Meadows* case is found in Judge Tuttle's analysis of the problem in *Pettway* at Pages 260-262:

> "The method of calculating a class-wide back pay award must not be rigid. This results from the impossibility of calculating the precise amount of back pay. There is no way of determining which jobs the class members would have bid on and have obtained if discriminatory testing,

> seniority, posting and bidding system, and apprentice, and on-job-training programs had not been in existence. Class members outnumber promotion vacancies; jobs have become available only over a period of time; the vacancies enjoy different pay rates; and a determination of who was entitled to the vacancy would have to be determined on a judgment of seniority and ability at that time. This process creates a quagmire of hypothetical judgments. . .
>
> It does not follow that back pay claims based on promotions cannot be awarded. Unrealistic exactitude is not required. . . .
>
> The method of computation will be a function of the complexity of the case. If the class is small, or the time period short, or the effect of the discrimination straightforward, a fairly precise determination of what each claimant's position would have been, but for the discrimination is possible. . . .
>
> However, when the class size or the ambiguity of promotion or hiring practices, or the multiple effects of discriminatory practices, or the illegal practices contained over an extended period of time calls for the quagmire of hypothetical judgment discussed earlier, a class-wide approach to the measure of back pay is necessitated. It should be emphasized that this is not a choice between one approach more precise than another. Any method is simply a process of conjectures. When a court is faced with the employment situation like this case, where employees start at entry level jobs in a department and progress into a myriad of other positions and departments on the basis of seniority and ability over an extended period of time, exact reconstruction of each individual claimant's work history, as if discrimination had not occurred, is not only imprecise but impractical."

Judge Tuttle went on then to discuss a "formula of comparability" method of computation to be used in cases where it is impractical to attempt an exact reconstruction of each in-

dividual claimant's work history. Considering the size of the class in this case, (340 women), the time period involved (almost 10 years), the imprecise effect of the discrimination (the seniority policies for example), and the impossibility of determination of what each claimant's position would have been but for the discrimination, the Special Master has determined that a formula of comparability and a class-wide approach is the only practical method of determining economic loss and back pay due in this case.

The formula devised by the District Court in *Timken Roller Bearing* on remand from the Sixth Court of Appeals, *Supra* provides some precedent. In that case, which involved racial discrimination in transfer policy, over a relatively short period of three and one-half years, the court determined a formula as follows:

1. The period of time was divided into seven six-months periods.

2. The number of transfers during each six months period was determined and the additional compensation paid thereby was computed on a cumulative basis.

3. The percentage of black employees employed by the defendant company during each of the six months periods was determined and it was assumed that in the absence of discrimination, black employees would have received an equivalent percentage of transfers.

4. Seven funds of money were established corresponding to each of the seven six-months periods of time.

5. The funds were then divided equally among those qualified class members who had been employed over half of the working period covered by each six-month period of time.

Considering then the facts of this case and the legal precedent detailed above, the Special Master has devised a formula for

computing back pay for the class members as follows:

1. Administrative and Supervisory Personnel which had been erroneously included in the list of male and female employees provided by defendant were stricken in accordance with defendant's Erratum dated March 28, 1975 thereby leaving 340 female employees in the class.

2. The average wage differential between male and female employees was determined for the years 1967 through 1974 based on the total wages per year of all male and female employees who worked the entire year and resulted as follows:

1967	-	$1,463.00
1968	-	1,217.00
1969	-	1,794.00
1970	-	1,860.00
1971	-	1,936.00
1972	-	1,976.00
1973	-	1,978.00
1974	-	2,009.00

The plaintiff's suggestion of an estimated wage differential of $500.00 in 1965 and $1,000.00 in $1966 was adopted because no wage figures were available for these two years and the two figures adopted appeared to be less than the wage differential for years in which figures were available and, therefore, to the defendant's advantage. See Exhibits 1 through 8 for a summary of these computations.

3. It was concluded that it would be impossible as well as impractical to adopt the defendant's suggestion that specific job vacancies be matched to specific employees at specific times during the past ten years. Therefore, defendant's suggested formula was deemed impossible as well as impractical. At the same time, the plaintiff's suggestion that class members be awarded one hundred percent of the wage differential for the entire period of time (an amount in excess of $2,000,000.00) was deemed to be excessive and based on a faulty assumption that all male jobs would have been held by females for the entire period of time.

4. The defendant's suggested use of the percentage of female employees in the work force of Christian County, Kentucky according to the 1970 census was adopted and it was determined that the number of male employees working the entire year for each year would be multiplied by 25% in order to derive a figure representing the number of jobs which would have been held by females but for the discriminatory practices. This figure representing a number of jobs was then multiplied by the average wage differential for that year thereby giving a total back pay award for that year. By this method, ten separate funds were computed including interest at 6% per year and resulted in a total back pay amount of $244,236.00. (The breakdown of the figures is indicated in Exhibit 9). It is realized that this method of computation is purely artificial. However, the only assumption on which it is based is that the average number of females working in male jobs during the years under consideration would have been equal to the average number of females in the work force of Christian County, Kentucky.

5. A list of class members eligible for back pay was then prepared for each of the ten years involved. (See Exhibits 12 through 19). It was determined that a class member must have worked at least one-half of the year, or period of time involved, in order to be eligible to share in the back pay award for that year. Each class member working at least one-half of the period of time concerned was determined to share equally in the award for that year. In the situation where a class member worked less than six months in any one year, but more than six months over a two year period, it was determined that she would share equally in the class award for the year in which she had worked the greater amount of time. It was determined that those class members who have worked for defendant less than six months, or less than three months in 1965, would be ineligible for back pay because it could not be shown that they suffered any economic loss during such a short period of time. It was deemed unlikely that such class members would have been eligible for a promotion nor would they have suffered from discriminatory seniority policies or transfer policies. Because of this requirements, 92 of the 340 class members were excluded from

any back pay award, it having been deemed that they had suffered no economic loss.

6. The end result of the above computation was that 238 women would share in the 10 different funds, the maximum award for a person working the entire 10 year period of time would be $2,631.40 and the average award per person would be $1,026.20. The maximum individual award for any one year would be $312.25.

The problem of burden of proof has not been discussed to this point. Defendant has contended, correctly, that the initial burden of proof in back pay casts rests on the individual claimant. *Pettway, Supra,* and cases cited therein. However, this initial burden has been considered to be very light and Judge Tuttle in *Pettway, Supra*, at Page 259 quoted the 5th Circuit's statement in *Johnson v. Goodyear Tire & Rubber Co.*, 491 F2d 1364 (CA5 1974) for guidance on this issue:

> "If an employee can show that he was hired into the labor department before April 22, 1971 and was subsequently frozen into that department because of the discriminatory policies established here, then we think the individual discriminatee has met his initial burden of proof unless there are apparent countervailing factors present. It will be incumbent upon Goodyear to show by convincing evidence that other factors would have prevented his transfer regardless of the discriminatory employment practices. *Goodyear, Supra*, at Pages 1379-80.

In the case at hand, it was concluded that the initial burden has been met by all those female employees who were shown by company records to have been hired during the period involved and subsequently frozen into the female job classification for more than 6 months. In other words, those 238 class members determined to be eligible for sharing in one or all of the ten funds herein have met the initial burden of proof and it is now incumbent upon the defendant to show by convincing evidence that other factors would have prevented the economic loss determined herein regardless of the defendant's discriminatory

employment practices. A list indicating the total tentative amount of back pay for the 238 employees deemed eligible is attached as Exhibit 20.

Award For Jane Mitchell

Based on the above formula, Jane Mitchell's share of the overall class award would be $1,198.54. In accordance with Paragraph 10 of the Guidelines For Special Master, a determination was made of the actual earnings of 7 sample female employees who were hired by the defendant subsequent to Jane Mitchell. The 7 female employees used were Vernette N. Anderton, Linda Taylor Brinlee, Ruth A. Dorsett, Velma Ezell, Mintie Futrell, Patricia L. Randall, and Shirley Tatum. Their annual average wage for each year from 1969 through 1974 was determined, interest at the rate of 6% per annum was added, and then Jane Mitchell's actual earnings for each year were subtracted with the following results:

1969 - Average annual wage of 7 sample employees was $3,720.00 less Jane Mitchell's actual earnings in 1969 of $2,811.06 = $908.94 plus interest at 6 % per annum for 6 years = $327.22 for a total award in 1969 of $1,236.16.

1970 - Average annual wage of the 7 sample employees was $4,390.00 plus interest at 6% per annum for 5 years = $1,317.00 for a total of $5,707.00 less Jane Mitchell's actual earnings in 1970 of $615.47 for a total award in 1970 of $5,091,53.

1971 - Average annual wage of the 7 sample employees was $4,444.85 plus interest at 6% per annum for 4 years = $1,066.76 for a total of $5,511.61 less Jane Mitchell's actual earnings in 1971 of $736.60 for a total back pay award in 1971 of $4,775.01.

1972 - Average annual wage of the 7 sample employees was $5,505.14 plus interest at 6% per annum for 3 years

= $990.92 for a total of $6,496.06 less Jane Mitchell's actual earnings in 1972 of $1,251.04 for a total back pay award in 1972 of $5,245.02.

1973 - Average annual wage of the 7 sample employees was $5,667.85 plus interest at 6% per annum for 2 years = $678.94 for a total of $6,346.79 less Jane Mitchell's actual earnings in 1973 of $1,082.00 for a total back pay award in 1973 of $5,264.79.

1974 - Average annual wage of the 7 sample employees was $5,099.57 plus interest at 6% per annum for 1 year = $305.97 for a total of $5,405.54 less Jane Mitchell's actual earnings in 1974 of $545.24 for a total award in 1974 of $4,860.30.

The above computation results in a total back pay award for 1969 through 1974 of $26,472.81 plus a back pay award based on the overall class award for 1965 through 1969 of $1,198.54. There is conflicting case law on the question of the deductibility of any amounts of money which Jane Mitchell received from unemployment compensation insurance. The parties may wish to submit this point to the court; however, if this question is left to the Special Master, the decision of the District Court in *Newman v. Avco Corp.*, 8 FEP 714 (DCMD Tenn. February 8, 1974) will be followed and any amounts of money received by the plaintiff as unemployment compensation for 1969 through 1974 will be deducted from the plaintiff's award as well as appropriate amounts for FICA and Federal Income Tax Withholding.

Respectfully submitted,

DAN KEMP
SPECIAL MASTER

Certificate of Service Omitted
Exhibits Omitted by Agreement